

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ARLEN PRESTON EVANS,

Defendant-Appellant.

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UNPUBLISHED

April 15, 2003

Nos. 236549; 242516

Eaton Circuit Court

LC No. 01-020029-FC

Before: Talbot, P.J., and Sawyer and O’Connell, JJ.

PER CURIAM.

Defendant was charged with two counts of armed robbery, MCL 750.529, and one count each of first-degree home invasion, MCL 750.110a(2), assault with intent to rob while armed, MCL 750.89, conspiracy to commit armed robbery, MCL 750.529, possession of a firearm during the commission of a felony, MCL 750.227b, and safe breaking, MCL 750.531.<sup>1</sup> On the second day of the jury trial, defendant pleaded guilty to the count of first-degree home invasion and the trial proceeded on the remaining six charges. The jury convicted defendant on the count of safe breaking. The trial court declared a mistrial on the remaining five counts on which the jury was deadlocked.<sup>2</sup> The trial court sentenced defendant to concurrent terms of five to twenty years’ imprisonment for each of the two offenses. In Docket No. 236549, we granted defendant’s delayed application for leave to appeal from his first-degree home invasion plea. In Docket No. 242516, defendant appeals as of right from his safe breaking conviction. We affirm.

I. Ineffective Assistance of Counsel

Defendant argues that his trial counsel was ineffective for conceding in opening statement that defendant was guilty of some of the charged offenses. Defendant asserts that there is nothing on the record to show that he consented to his counsel’s unusual trial strategy to admit defendant’s guilt after defendant had pleaded not guilty. Because defendant did not move for a new trial or a *Ginther*<sup>3</sup> hearing, this Court’s review of his claim of ineffective assistance of

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<sup>1</sup> Three co-defendants pleaded guilty to the charges against them before the instant jury trial was held.

<sup>2</sup> The prosecutor opted not to retry the remaining charges.

<sup>3</sup> *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

counsel is limited to mistakes apparent on the record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

Effective assistance of counsel is presumed, and a defendant bears a heavy burden to prove otherwise. *People v Eloby (After Remand)*, 215 Mich App 472, 476; 547 NW2d 48 (1996). To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). Defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and that the attendant proceedings were fundamentally unfair or unreliable. *People v Poole*, 218 Mich App 702, 718; 555 NW2d 485 (1996). Defendant must also overcome a strong presumption that counsel's tactics were matters of sound trial strategy. *Id.* This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999).

Defendant claims that his trial counsel effectively pleaded guilty for defendant in contravention of defendant's earlier not-guilty plea, and his intention to stand trial. On appeal, defendant vaguely asserts that his guilty plea to first-degree home invasion that he made on the second day of trial "appears to have been a decision which was made only during the course of the trial," and that the fact that he entered a guilty plea "cannot fairly be construed as a voluntary and retroactive consent to his trial attorney's already expressed strategy." In other words, defendant does not directly assert that he did not consent to his counsel's trial strategy or that his guilty plea on the charge of first-degree home invasion was made as a direct result of his trial counsel's opening statement. Rather, defendant asserts that the record does not show that he expressly consented to his counsel's trial strategy before the opening statement was made.

In support of his argument, defendant relies on a decision by the Sixth Circuit Court of Appeals that held that counsel may not admit his client's guilt contrary to the client's earlier entered not-guilty plea "unless the defendant unequivocally understands the consequences of the admission." *Wiley v Sowders*, 647 F2d 642, 649 (CA 6, 1981). However, as the prosecutor points out, this Court has determined that due process does not require such an on-the-record inquiry. *People v Wise*, 134 Mich App 82, 99; 351 NW2d 255 (1984). Defendant also argues that this Court's decision in *People v Fisher*, 119 Mich App 445; 326 NW2d 537 (1982) supports the rule of law established in *Wiley*. There is nothing in *Fisher* that supports defendant's argument. Rather, *Fisher* affirmed the well-established law that "[i]f a defendant who has pled not guilty wishes to admit his guilt, his attorney should bring his wish to the attention of the trial court so that defendant can be questioned personally." *Id.* at 449.

In his opening statement, the prosecutor informed the jury that the three other men who were involved in the incident had pleaded guilty in exchange for their testimony on defendant's role in planning to break into the house of one of the men's girlfriends and break into a safe on the premises. The prosecutor also informed the jurors that they would hear tape recordings of three different statements that defendant gave to the police in which he described with detail his role in planning and executing the alleged crimes. Defendant's counsel responded in opening argument by acknowledging that defendant had made the statements to the police. The pertinent part of counsel's opening statement is as follows:

It's going to be crystal clear from the proofs and from [defendant's] own words that he was involved in what happened. Absolutely. It's also going to be crystal clear that he is guilty of committing a crime or crimes by the words out of his own mouth.

He participated in some way and you're going to have to decide which ways he participated. And some of those ways, remember, in my mind are gonna constitute a crime. In other words, this plan that was cooked up, he knew what the plan was, he knew what the deal was, but he didn't know all of the details and he had no idea that these three convicted criminals were going to do what they did.

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This man is guilty, but you're gonna have to decide what all he's guilty of. You're gonna have to decide if he's guilty of everything from soup to nuts as [the prosecutor] has already urged you to find him; or is he guilty of some included offenses; or is he guilty of part of what [the prosecutor] charged him with and some included offenses?

In my closing argument I'm not going to be asking you to find him not guilty. That would be foolish. He participated in the planning, he was aware of the original plan, and he drove the vehicle out there . . . to go out and rob the place.

Defendant's counsel never admitted defendant's guilt to any one specific charge, but spoke only generally of defendant's culpability and encouraged the jury to consider lesser-included offenses. It is not ineffective assistance of counsel for defense counsel to concede lesser crimes in hopes of avoiding a finding of guilt on greater ones. *Wise, supra* at 98.

The elements of first-degree home invasion are: (1) that the defendant broke and entered into the dwelling or entered the dwelling without permission; (2) that when the defendant did so, he either intended to commit a felony, larceny or assault or actually committed a felony, larceny or assault while entering, exiting or present in the dwelling; and (3) that when the defendant entered, was present in, or was leaving the dwelling, he was armed with a dangerous weapon or another person was lawfully in the dwelling. MCL 750.110a(2). The term "without permission" is defined as "without having obtained permission to enter from the owner or lessee of the dwelling or from any other person lawfully in possession or control of the dwelling." MCL 750.110a(1)(c). The intent to commit larceny may be reasonably inferred from the nature, time, and place of the defendant's acts before and during the breaking and entering. *People v Uhl*, 169 Mich App 217, 220; 425 NW2d 519 (1988). Because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999).

The evidence in this case overwhelmingly indicated that defendant assisted two of his three accomplices in entering the house without permission to commit a larceny. The evidence also showed defendant's prior knowledge that one of the accomplices was armed and intended to use the gun to threaten the young resident in the dwelling. In conceding guilt to defendant's

general involvement in the planning and execution of the home invasion, defense counsel was merely stating the obvious. “Where defense counsel in opening statement recognizes and candidly asserts the inevitable, he is often serving his client’s interest best by bringing out the damaging information and thus lessening the impact.” *Id.*

The timing of defendant’s guilty plea is indicative of defendant’s consent to his trial counsel’s trial strategy. The jury heard defendant’s first recorded statement at the end of the first day of trial. Defendant pleaded guilty on the morning of the second day of trial. Defendant’s trial counsel also expressly requested the trial court to inform the jury that defendant had admitted guilt to that charge and a charge of absconding on bond that was not part of the trial. The trial court took particular care to make sure that defendant understood that his guilty pleas were being made without the benefit of any plea bargain offer by the prosecutor, and that the crime of first-degree home invasion carried a maximum sentence of twenty years’ imprisonment and absconding on bond carried a maximum of four years’ imprisonment. The trial court carefully explained the particular rights that defendant was giving up in exchange for the guilty pleas, including the right to remain silent at trial. We conclude that this satisfied the established rule of law articulated in *Fisher, supra*.

Further, defendant’s own testimony expressly provided a detailed description of his participation in the plan to break into the house and “larcenize” a safe on the premises. However, he denied knowing that one of his companions had a gun, and he testified that he never expected the crime would turn into an armed robbery. It is clear from the record that defendant was going to testify to his complicity in planning and executing the home invasion; defense counsel merely conceded the obvious and used a permissible trial tactic. *Wise, supra* at 98. The tactic was successful. The jury deadlocked on five of the remaining six charges against defendant, and the prosecutor has opted not to retry those charges.

Trial counsel did not specifically admit to defendant’s guilt to any of the charges. On this record, defendant’s recorded statements to the police, the testimony of his accomplices, and defendant’s own testimony showed defendant’s guilt beyond a reasonable doubt in at least two of the charges – first-degree home invasion and safe breaking. Defendant had pleaded guilty to the former and the jury convicted him on the latter. From our review of the record, we conclude that defendant has not shown that he received ineffective assistance of counsel.

## II. Sentencing

Defendant next argues that he is entitled to resentencing because the trial court improperly scored offense variables (OV) 10 and 13. Because the offense occurred after January 1, 1999, the legislative sentencing guidelines apply. MCL 769.34.

This Court reviews a trial court’s sentencing decision for an abuse of discretion. *People v Cain*, 238 Mich App 95, 130; 605 NW2d 28 (1999). A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). Trial courts are afforded broad discretion in calculating sentencing guidelines, and appellate review of those calculations is very limited. A scoring decision for which there is any evidence in support will be upheld. *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996). If a sentencing issue requires the application of the instructions in the legislative sentencing

guidelines, it is a question of law reviewed by this Court de novo. *People v Libbett*, 251 Mich App 353, 365; 650 NW2d 407 (2002).

With respect to OV 10, MCL 777.40(1)(b) dictates a score of ten points for the exploitation of a victim's youth. The evidence showed that the victim was a teenage girl who was threatened with a gun during the invasion of her home. The conspirators decided to carry out their plan to invade and steal from the home despite the girl's presence, particularly because they perceived her as being easily exploitable because she was a "little girl" who "wasn't . . . very bright." Although the victim was a young adult, close in age to defendant, she was accosted by her assailants while her parents, to whom a youth in that setting would normally look for guidance and security, were not at home. We conclude that the evidence in this case was sufficient to support the trial court's decision to score ten points for OV 10.

With respect to OV 13, defendant did not object to the trial court's ruling, but expressly deferred to the trial court's understanding of the evidence in this case. Because defendant's appellate challenge to the scoring of OV 13 is not properly preserved, we do not address it. MCL 769.34(10).

Affirmed.

/s/ Michael J. Talbot  
/s/ David H. Sawyer  
/s/ Peter D. O'Connell